

Message Text

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ACTION EUR-12

INFO OCT-01 ISO-00 IO-13 ACDA-12 HA-05 SCS-06 CA-01
HEW-04 CIAE-00 DODE-00 PM-05 H-01 INR-07 L-03
NSAE-00 NSC-05 PA-01 PRS-01 SP-02 SS-15 USIA-06
/100 W

-----114844 211156Z /10

O P 211135Z DEC 77
FM AMEMBASSY BONN
TO SECSTATE WASHDC PRIORITY 4174
USMISSION USBERLIN IMMEDIATE
INFO AMEMBASSY BERLIN
AMEMBASSY LONDON
AMEMBASSY MOSCOW
AMEMBASSY PARIS
USMISSION USNATO

C O N F I D E N T I A L SECTION 01 OF 02 BONN 21055

E.O. 11652: GDS
TAGS: PGOV, AKB, BQG
SUBJECT: REFERRAL OF CASE FROM BERLIN COURT TO FRG
CONSTITUTIONAL COURT (FCC)

REFS: (A) STATE 302190; (B) USBER 3179; (C) USBER 3176;
(D) STATE 301202; (E) BONN 20877

SUMMARY: FRG INFORMED BONN GROUP DECEMBER 20 THAT THE
FCC IS CONSIDERING A CASE FROM THE FRG WHICH MAY ALSO
DECIDE THE SUBJECT CASE. THE FRG IS CONFIDENT IT
CAN OBTAIN AN EXTENSION OF THE DECEMBER 31 DEADLINE FOR
EXPRESSION OF VIEWS ON THE SUBJECT CASE SO IT CAN BE
DETERMINED WHETHER THE FRG CAN HAVE THE ISSUE IN THE
SUBJECT CASE DECIDED OR MOOTED BY THE CASE FROM THE
FRG. THE ALLIES, WHO WERE PREPARED TO DELIVER THE
AIDE MEMOIRE AT THE BONN GROUP MEETING, DECIDED NOT TO
DO SO. WE RECOMMEND NO FURTHER ALLIED ACTION PENDING
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FURTHER WORD FROM THE FRG. ACTION REQUESTED: GUIDANCE.
END SUMMARY.

1. AT DECEMBER 20 TRIPARTITE MEETING OF ALLIED BONN
GROUP REPS, AGREEMENT TO TEXT OF AIDE MEMOIRE IN REF
(E), WITH AMENDMENT AS PROPOSED BY DEPARTMENT IN REF
(D), WAS CONFIRMED BY ALL REPS. ALL THREE REPS WERE

PREPARED TO HAND OVER IDENTICAL NOTES TO FRG AT BONN GROUP MEETING LATER IN THE DAY. HOWEVER, THE FRG REP (VON BRAUNMUEHL) TOLD US REP SHORTLY BEFORE THE TRIPARTITE MEETING THAT THE FRG HAD NEW INFORMATION WHICH MIGHT MAKE IT UNNECESSARY FOR THE ALLIED REPS TO EXPRESS VIEWS ON THE CASE AND THAT THE FRG WAS REQUESTING ON ITS OWN A DELAY OF FCC CONSIDERATION OF THE CASE. THE ALLIED REPS AGREED AT THE TRIPARTITE MEETING THAT IF THE FRG IS SEEKING TO OBTAIN SUCH A DELAY, THE ALLIED NOTES MIGHT UNDERCUT THAT EFFORT SINCE THE NOTES STATE THAT THE ALLIES HAVE NOT REACHED A CONCLUSION AS TO WHETHER THE REFERENCE TO THE FCC WAS PROPER. THEY AGREED TO DELAY DELIVERY OF THE NOTES PENDING THE RECEIPT OF INFORMATION FROM VON BRAUNMUEHL.

2. THE US REP DISTRIBUTED COPIES OF THE TECHNICAL NOTE (REF B) AT THE TRIPARTITE MEETING. BECAUSE NEITHER THE BRITISH NOR FRENCH HAD INSTRUCTIONS ON IT, ALTHOUGH LONDON AT LEAST HAD REPORTEDLY RECEIVED IT, THE ALLIES WERE UNABLE MEANINGFULLY TO DISCUSS ITS CONTENTS. IT EMERGED HOWEVER THAT UK REP (EYERS) BELIEVES THE BRITISH ARE NOT PREPARED TO STATE THAT THE REFERENCE TO THE FCC WOULD BE ILLEGAL. THEY WISH TO PREVENT REFERENCE OF THE CASE TO THE FCC, BUT ON POLITICAL GROUNDS.

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3. AT THE FULL BONN GROUP MEETING LATER IN THE DAY, VON BRAUNMUEHL SAID THAT IN A MEETING WITH OTHER MINISTRIES CONCERNED WITH THE MATTER, ESPECIALLY THE MINISTRY OF JUSTICE, THE FOREIGN OFFICE LEARNED THAT THERE IS ANOTHER CASE (FROM THE FRG, NOT BERLIN) PENDING BEFORE THE FCC WHOSE LEGAL ISSUES OVERLAP WITH THE LEGAL ISSUE IN THE CASE FROM BERLIN. THE MINISTRY OF LABOR HAS BEEN ASKED TO SEE WHETHER THE LEGAL ISSUE IN THE BERLIN CASE CAN BE SETTLED BY THE DECISION ON THE CASE FROM THE FRG THEREBY MAKING IT UNNECESSARY FOR THE FCC TO DECIDE THE CASE FROM BERLIN. BASED ON THE OUTCOME OF THE CASE FROM THE FRG, THE FCC DECISION MAY REQUIRE A CHANGE IN LAW OR REGULATION WHICH WILL MOOT THE BERLIN CASE. VON BRAUNMUEHL SAID THAT THE FRG ANTICIPATES NO DIFFICULTY IN OBTAINING AN EXTENSION OF THE PRESENT DECEMBER 31 DEADLINE BY WHICH IT OTHERWISE MUST PRESENT ITS VIEWS AND, IN ADDITION, THAT HE HOPES THERE WILL BE THE POSSIBILITY OF ELIMINATING THE WHOLE QUESTION SO IT WILL NOT BE NECESSARY FOR THE ALLIES TO GIVE THEIR VIEWS. HE PROMISED TO INFORM US AS SOON AS THE EXTENSION OF THE DEADLINE IS CONFIRMED.

4. COMMENT: THE UNEXPECTED DEVELOPMENT REPORTED BY

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C O N F I D E N T I A L SECTION 02 OF 02 BONN 21055

VON BRAUNMUEHL IS A WELCOME ONE. VON BRAUNMUEHL TOLD
THE US REP THE MORNING OF DECEMBER 20 THAT THE FOREIGN
OFFICE UNDERSTANDS THAT THE LIKELY ALLIED REACTION TO
A HEARING OF THE CASE BY THE FCC WOULD BE A NEGATIVE
ONE AND THAT THE FRG WAS ATTEMPTING TO AVOID A
SITUATION IN WHICH ALLIED VIEWS WOULD BE REQUIRED.

5. SHOULD EYERS' VIEWS (PARAGRAPH 3 SUPRA) BE CONFIRMED
BY LONDON (AND THEY MAY NOT BE; THE UK LEGAL ADVISER
WAS NOT PRESENT AT THE MEETING), THE DIFFICULTIES IN
REACHING AGREEMENT ON THE TECHNICAL NOTE MAY BE SUBSTAN-
TIAL. WE ARE FRANKLY UNCOMFORTABLE WITH TELLING THE
FRG THAT REFERENCE TO THE FCC IS NOT (OR MAY NOT BE)
ILLEGAL BUT IS POLITICALLY INOPPORTUNE AND THAT THE
ALLIES ARE THEREFORE PROHIBITING THE REFERENCE OF A
CASE FROM BERLIN TO THE FCC. SINCE THE FRG (AND
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PRESUMABLY THE SENAT) IS AWARE OF THE DIRECTION OF ALLIED THINKING, HOWEVER, SUCH A NOTE MAY PROVE UNNECESSARY UNLESS THE ALLIES ARE PRESSED FOR A FULLER EXPLANATION OF THIS REASONING BEHIND THEIR POSITION. FOR THE MOMENT, WE RECOMMEND NO ALLIED ACTION PENDING THE OUTCOME OF THE FOREIGN OFFICE EFFORTS TO OBTAIN A DELAY AND TO MOOT THE CASE ALTOGETHER.

6. ACTION REQUESTED: GUIDANCE.
STOESSEL

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